

THE HONORABLE TANA LIN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILLIAM MCNAE and RONDA MCNAE,

Plaintiffs,

v.

ARAG INSURANCE COMPANY,

Defendant.

Case No. 2:24-cv-00211-TL

DEFENDANT ARAG INSURANCE  
COMPANY'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT (ERISA  
PREEMPTION)

NOTED FOR CONSIDERATION:  
April 17, 2025

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Defendant, ARAG Insurance Company (“ARAG”), respectfully moves for partial summary judgment on the basis that the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001 *et seq.*, preempts Plaintiffs’ state law claims arising under ARAG Policy No. 10377 issued to Microsoft Corporation (“Microsoft”) for the policy period January 1, 2022 through December 31, 2022 (“Microsoft Policy”). The Microsoft Policy includes the Group Legal Insurance Certificate and Service Plan (“Microsoft Certificate”) provided to participants under, and incorporated within, the Microsoft Policy.<sup>1</sup>

### I. INTRODUCTION

In this action, Plaintiffs—spouses Ronda McNae (“Ms. McNae”) and William McNae (“Mr. McNae”)—allege that ARAG wrongfully denied them insurance benefits, negligently handled their insurance claims, acted in bad faith, and violated Washington statutes that, where applicable, govern claims handling practices. ECF 14 (“Am. Compl.”) at ¶¶ 58-102.

ARAG vigorously disputes these accusations. That said, the narrow purpose of this motion is to bring clarity and efficiency to these proceedings by obtaining partial summary judgment that Plaintiffs’ state law claims arising under the Microsoft Policy must be dismissed because ERISA preempts them. The documents that Microsoft produced in response to the parties’ subpoenas conclusively establish that the Microsoft Policy is an employee benefit consisting of “prepaid legal services” that Mr. McNae, as a then-Microsoft employee, obtained

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<sup>1</sup> The Microsoft Policy defines “benefits” as “the legal coverages listed on the declarations page of the policy or in the benefits section of the Certificate of Insurance” and, in turn, defines “Certificate of Insurance” or “Certificate” as “the document provided by [ARAG] to the named insured that describes the benefits and terms of the insurance policy.” Cosimano Decl., Ex. 1 at ARAG002547. The Microsoft Policy defines “named insured” as “a person enrolled via [Microsoft] with [ARAG] as entitled to coverage under the terms of this policy” and defines “insured” more broadly to include both “the named insured and the named insured’s spouse.” *Id.* For economy, and because the Microsoft Certificate (Cosimano Decl., Ex. 2) is incorporated into the Microsoft Policy as above described, future references to the “Microsoft Policy” include the Microsoft Certificate.

1 for himself and Ms. McNae under the Microsoft Corporation Welfare Plan (“Microsoft Welfare  
 2 Plan”)—an “employee welfare benefit plan” and “employee benefit plan” as defined in 29  
 3 U.S.C. §§ 1002(1) and 1002(3) that is therefore exclusively governed by ERISA under 29  
 4 U.S.C. § 1003.

5 Plaintiffs may seek to evade ERISA preemption by invoking 29 C.F.R. § 2510.3-1(j),  
 6 known as the “Voluntary Plan Safe Harbor.” For the safe harbor to apply, the McNaes must  
 7 establish, among other things, that “[t]he *sole functions of [Microsoft]* with respect to the  
 8 [Microsoft Policy] are, *without endorsing the [Microsoft Policy]*, to permit [ARAG] to  
 9 publicize the program to employees or members, to collect premiums through payroll  
 10 deductions or dues checkoffs and to remit them to [ARAG].” *Id.* (emphasis added). But the  
 11 undisputed documentary evidence establishes that, as a matter of law, Microsoft both (a)  
 12 “endors[ed]” the Microsoft Policy within the meaning of Ninth Circuit case law and (b)  
 13 performed “functions...with respect to” the Microsoft Policy far beyond the modest exempted  
 14 functions. Because either of these circumstances precludes any application of the Voluntary  
 15 Plan Safe Harbor to the Microsoft Policy, and because Plaintiffs cannot establish a triable  
 16 dispute as to either, ARAG is entitled to partial summary judgment that ERISA governs the  
 17 Microsoft Policy and preempts all state law claims arising under the same.

## 18 II. FACTUAL BACKGROUND

### 19 A. Mr. McNae Elects Coverage For Prepaid Legal Services Under The Microsoft 20 Policy As An Employee Benefit

21 During open enrollment at Microsoft for the 2022 benefit year (i.e., January 1, 2022  
 22 through December 31, 2022), Mr. McNae elected to obtain coverage for himself and eligible  
 23 dependents under the Microsoft Policy. Mullaly Decl., Ex. 1. The Microsoft Policy provides  
 24 prepaid legal services—i.e., benefits that cover the expense of defined legal services in the event

1 of specified contingencies, such as adoption, divorce, or certain types of lawsuits. Cosimano  
 2 Decl., Ex. 1 at ARAG002553-ARAG002655. Unlike liability insurance (e.g., auto liability  
 3 coverage), legal insurance does not indemnify the insured against *liability* to third parties. The  
 4 benefit at issue here, for example, only pays for certain legal services while the insured seeks  
 5 to settle or otherwise resolve an eligible civil action. *Id.* at ARAG002557 (“Defense of Civil  
 6 Damage Claims”). Also unlike most liability insurance, the Microsoft Policy does not include  
 7 any duty to defend. Quite the contrary, it expressly provides that ARAG “shall at no time  
 8 control” the defense. *Id.* at ARAG002552.

9 **B. Ms. McNae Is Sued In The Underlying Federal Action And Initiates A Claim**  
 10 **Under The Microsoft Policy**

11 On July 14, 2022, Michael J. Fitzgerald (“Mr. Fitzgerald”) filed a civil action, No. 1:22-  
 12 cv-22171, in the United States District Court for the Southern District of Florida (“Underlying  
 13 Federal Action”). Mullaly Decl., Ex. 9. The Underlying Federal Action named Ms. McNae as  
 14 defendant and alleged that she breached a settlement agreement with Mr. Fitzgerald. *Id.*

15 As Mr. McNae’s spouse, *see* Am. Compl. ¶ 12, Ms. McNae is an “insured” as that term  
 16 is defined in the Microsoft Policy. Cosimano Decl., Ex. 1 at ARAG002547. In connection with  
 17 being named as defendant in the Underlying Federal Action, Ms. McNae made a claim under  
 18 the Microsoft Policy’s “Defense of Civil Damages Claims” benefit on July 18, 2022. *Id.*, ¶ 5.  
 19 The Microsoft Policy defines “insured event” as “an event covered by this policy whose  
 20 initiation date will be considered the earlier of the date (a) written notice of a legal dispute is  
 21 sent or filed by you or received by you; or (b) a ticket or citation is issued; or (c) an attorney is  
 22 hired” and further provides that the policy “applies to insured events which occur...while [the  
 23 Microsoft Certificate] is in effect.” *Id.*, Ex. 1 at ARAG002547, ARAG002549. The Microsoft  
 24



1 Certificate states a “Policy Period” from January 1 to December 31, 2022. *Id.*, Ex. 2 at  
2 ARAG002935.

3 Subject to the terms and conditions of the Microsoft Policy, ARAG began providing  
4 benefits to Ms. McNae under the Microsoft Policy in connection with the Underlying Federal  
5 Action. *Id.*, ¶ 5. ARAG has agreed, subject to written reservations of rights, to pay the costs of  
6 eligible legal services for certain defense counsel, chosen by Ms. McNae from among ARAG’s  
7 Network Attorneys, to defend Ms. McNae in the Underlying Federal Action. *Id.*, ¶ 6.

8 **C. Mr. McNae Is Sued In The Underlying Federal Action And Initiates A Claim**  
9 **Under The Microsoft Policy**

10 On December 16, 2022, Mr. Fitzgerald moved for leave to amend his complaint in the  
11 Underlying Federal Action to, among other things, add Mr. McNae as a defendant and assert  
12 additional claims against Ms. McNae. Mullaly Decl., Ex. 10. The Court granted the motion on  
13 December 29, 2022 (*id.*, Ex. 11), and, on December 30, 2022, Mr. Fitzgerald filed a first  
14 amended complaint against Ms. McNae and Mr. McNae alleging breach of a settlement  
15 agreement and a series of tort claims (*id.*, Ex. 12). In connection with being named a defendant  
16 in the Underlying Federal Action in December 2022, Mr. McNae made a claim under the  
17 Microsoft Policy’s “Defense of Civil Damages Claims” benefit. Cosimano Decl., ¶ 7. Subject  
18 to the terms and conditions of the Microsoft Policy, ARAG began providing benefits to Mr.  
19 McNae under the Microsoft Policy in connection with the Underlying Federal Action. *Id.*

20 *Mr. McNae*—but not *Ms. McNae*—was dismissed from the Underlying Federal Action  
21 on jurisdictional grounds on October 24, 2023. Mullaly Decl., Ex. 13. ARAG paid the costs of  
22 eligible legal services for certain defense counsel, chosen by Mr. McNae, to defend Mr. McNae  
23 in the Underlying Federal Action through his dismissal. Cosimano Decl., ¶ 8.

**D. Mr. McNae Is Sued In The Underlying State Action And Initiates A Claim Under The Conversion Policy**

Microsoft terminated Mr. McNae’s employment effective September 9, 2023. Mullaly Decl., Ex. 2. Mr. McNae purchased new coverage from ARAG—this time not a part of Microsoft’s group policy—to address future “insured events” as defined in said new coverage (“Conversion Policy” and “Conversion Certificate”). Cosimano Decl., ¶ 11, Ex. 3, Ex. 4. Mr. McNae’s coverage under the Conversion Policy and Conversion Certificate became effective beginning October 1, 2023. *Id.*

On November 2, 2023, Mr. Fitzgerald filed a civil action, No. 2023-025855-CA-01, in the Circuit Court of the Eleventh Judicial Circuit In and For Miami-Dade County, Florida (“Underlying State Action”). Mullaly Decl., Ex. 14. The action named Mr. McNae as defendant and substantially replicated the claims against Mr. McNae dismissed from the Underlying Federal Action for lack of subject matter jurisdiction. *Id.*; *compare id.*, Ex. 12. In connection with the Underlying State Action, Mr. McNae made a claim under the Conversion Policy’s “Defense of Civil Damages Claims” benefit on about November 8, 2023. Cosimano Decl., ¶ 13. Mr. McNae’s alleged claims arising from the Underlying State Action, the Conversion Policy, and the Conversion Certificate are not the subject of this motion for partial summary judgment. That said, ARAG has agreed, subject to written reservations of rights and to the terms and conditions of the Conversion Policy, to pay the costs of eligible legal services for certain defense counsel, chosen by Mr. McNae from among ARAG’s Network Attorneys, to defend Mr. McNae in the Underlying State Action. *Id.*, ¶ 14.

**E. Microsoft Establishes The Microsoft Corporation Welfare Plan, Which Includes The Microsoft Policy**

Microsoft originally established the Microsoft Corporation Welfare Plan (again, “Microsoft Welfare Plan”) effective January 1, 1994. Mullaly Decl., Ex. 6 at ARAG011380.

1 Microsoft amended and restated the Microsoft Welfare Plan by a written instrument titled  
 2 “Microsoft Corporation Welfare Plan As Amended and Restated Effective January 1, 2016” (as  
 3 further amended on December 16, 2021, the “Wrap Plan Document”).<sup>2</sup> *Id.* at ARAG011377-  
 4 ARAG011438.

5 **1. Microsoft Is The Named Fiduciary And Plan Administrator**

6 The Wrap Plan Document, at Section 5.1, designates Microsoft as the Named Fiduciary  
 7 and the Plan Administrator of the Microsoft Welfare Plan. *Id.* at ARAG011390.

8 Per Section 5.2(a)(ii), the Plan Administrator is empowered to “interpret the provisions  
 9 of the Plan and determine any question arising under the Plan, or in connection with the  
 10 administration or operation thereof.” *Id.*

11 Per Section 5.2(a)(iv), the Plan Administrator is empowered to “determine eligibility  
 12 for and amount of benefits for any Participant.” *Id.*

13 Per Section 5.2(a)(vii), the Plan Administrator is empowered to “delegate and allocate,  
 14 specific responsibilities, obligations and duties imposed by the Plan, to one or more employees,  
 15 officers or such other persons as the Plan Administrator deems appropriate.” *Id.*

16 More generally, under Section 5.2(b), the Plan Administrator “shall have all powers  
 17 necessary or appropriate to carry out its duties, including, without limitation, the sole  
 18 discretionary authority to take the actions described in Section 5.2(a) and to interpret the  
 19 provisions of the Plan and the facts and circumstances of claims for benefits.” *Id.*

20 Section 5.2(b) of the Wrap Plan Document also provides that: “Any interpretation or  
 21 construction of or action by the Plan Administrator with respect to the Plan and its

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22 <sup>2</sup> The Sixth Amendment, executed December 20, 2023 and effective January 1, 2024, follows  
 23 the 2022 benefit year relevant to these proceedings. Mullaly Decl., Ex. 6 at ARAG011439-  
 24 ARAG011440. Thus, while the Sixth Amendment is not part of the Wrap Plan Document for  
 purposes of this dispute, neither is its subject matter material. *See id.*

1 administration shall be conclusive and binding upon any and all parties and persons affected  
 2 hereby, subject to the exclusive appeal procedure set forth in Section 5.6. Benefits under this  
 3 Plan will be paid only if the Plan Administrator decides in his discretion that the claimant is  
 4 entitled to them.” *Id.* at ARAG011390, -391.

5 Section 3 of the Wrap Plan Document states that: “Each Participant may elect to receive  
 6 coverage under the benefit coverages described in the Appendices. The terms, conditions and  
 7 limitations of benefits offered under this Plan are contained in the applicable Component Plans  
 8 referenced in the Appendices and which are incorporated herein in full, as amended from time  
 9 to time.” *Id.* at ARAG011388.

## 10 **2. The Microsoft Policy Is A Component Plan Of The Microsoft Welfare Plan**

11 Section 1.3 of the Wrap Plan Document defines the phrase “Component Plan” to mean  
 12 “a written plan identified in the Appendices and incorporated herein by reference. For an  
 13 insured plan, the written plan is the certificate of coverage.” *Id.* at ARAG011381.

14 Appendix II to the Wrap Plan Document incorporates the Microsoft Policy by stating:  
 15 “The terms, conditions and limitations of the benefits described in Section 3 of the Plan are  
 16 contained in the summary plan description(s) for the Component Plans listed in this Appendix  
 17 II, which are incorporated herein by reference. \*\*\* The Component Plans are: \*\*\* B. The  
 18 following non-health care benefit programs: \*\*\* 5. Group legal services benefits, ARAG Group  
 19 contract number 3181-420.” *Id.* at ARAG011408; *see also id.* at ARAG011388 (“contract  
 20 number...may change from time to time and shall be reflected in the applicable Component  
 21 Plans”).

22 The Wrap Plan Document governs the claims procedure applicable to the Microsoft  
 23 Policy (and other Component Plans). *Id.* at ARAG011391-ARAG011401. Specifically, Section  
 24 5.6 states, among other things: “Claims shall be evaluated by the Plan Administrator or such

1 other person or entity designated by the Plan Administrator as specified in the applicable  
 2 Component Plans and shall be approved or denied in accordance with the terms of the Plan  
 3 including the Component Plans. All references to the Plan Administrator in this Section 5.6  
 4 shall include such delegate.” *Id.* at ARAG011391.

5 Section 6.1 of the Wrap Plan Document describes how the Microsoft Welfare Plan may  
 6 be amended or terminated and by whom. *Id.* at ARAG011403.

### 7 **3. Microsoft Confirms That The Microsoft Policy Is “Subject To ERISA”**

8 Finally, Section 7.14 of the Wrap Plan Document affirms that the Microsoft Policy is a  
 9 benefit subject to ERISA. It states: “This Plan provides certain benefits which are subject to  
 10 ERISA, and other benefits, such as dependent care reimbursement benefits, which are not  
 11 subject to ERISA. ***Only those benefits identified in ERISA Sections 3(1) and 4 are subject to***  
 12 ***ERISA.*** This Plan shall not be construed to subject any non-ERISA benefits to the requirements  
 13 of ERISA.” *Id.* at ARAG011406 (emphasis added).

14 ERISA Section 3(1), codified at 29 U.S.C. § 1002(1), identifies the following benefits:  
 15 “medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident,  
 16 disability, death or unemployment, or vacation benefits, apprenticeship or other training  
 17 programs, or day care centers, scholarship funds, or ***prepaid legal services***” (emphasis added).

18 The Microsoft Policy provides prepaid legal services benefits, and therefore is a benefit  
 19 “identified in ERISA Section[] 3(1).” Cosimano Decl., Ex. 1. Indeed, the “Defense of Civil  
 20 Damage Claims” coverage invoked by Plaintiffs provides for, subject to the terms and  
 21 conditions of the Microsoft Policy, “Legal services for an insured in defense against civil  
 22 damage(s) claims....” *Id.* at ARAG002557.

23 The Microsoft Policy satisfies the requirement for applicability of ERISA set forth in  
 24 ERISA Section 4, codified at 29 U.S.C. § 1003, because, as above described, the Microsoft

1 Policy is a Component Plan in the Microsoft Welfare Plan, which in turn is an “employee  
2 benefit plan established or maintained” by Microsoft—an “employer engaged in commerce or  
3 in any industry affecting commerce.” 29 U.S.C. § 1003(a).

4 **F. Microsoft Included The Microsoft Policy In The Microsoft Welfare Plan’s “2022  
5 Summary Plan Description” Under ERISA**

6 ERISA requires the administrator of an employee benefit plan to prepare and furnish to  
7 participants and beneficiaries a “summary plan description” containing certain information. 29  
8 U.S.C. §§ 1022, 1024(b). In connection with the Microsoft Welfare Plan, Microsoft prepared  
9 and made available a document titled “2022 Summary Plan Description” (“2022 SPD”). It  
10 states: “This document is intended to serve as a Summary Plan Description (SPD) as defined  
11 by the Employee Retirement Income Security Act of 1974 (ERISA) for such programs  
12 described within that are governed by ERISA. The terms and conditions of the Microsoft  
13 Corporation Welfare Plan (Plan) are set forth in this SPD, in the Microsoft Corporation Welfare  
14 Plan wrap document (the “Welfare Plan”), the Benefits@Microsoft Program, the Microsoft  
15 Healthcare Reimbursement Plan, the Microsoft Dental and Vision Care Reimbursement Plan,  
16 the Microsoft Dependent Care Reimbursement Plan, and in the insurance policies and other  
17 component plan documents incorporated into the Welfare Plan. The Welfare Plan together with  
18 this SPD and the other incorporated documents constitute the written instruments under which  
19 the Plan is established and maintained.” Mullaly Decl., Ex. 4 at ARAG010882.

20 *An entire section of the 2022 SPD is dedicated to the Microsoft Policy*, with  
21 subsections including “how the plan works,” “where you can get legal help,” “what the plan  
22 covers,” “exclusions and limitations,” and “how to file a claim.” *Id.* at ARAG011264-  
23 ARAG011289.

1 The 2022 SPD states that “ERISA requires that certain information be furnished to each  
 2 participant in an employee benefit plan” and then immediately proceeds to identify, with respect  
 3 to the Microsoft Welfare Plan, the plan sponsor (Microsoft), the type of plan (“Welfare benefit  
 4 plan providing health and welfare benefits”), the plan administrator and named fiduciary  
 5 (Microsoft), the source of funding (as to “Legal insurance benefits,” “provided through the  
 6 purchase of insurance from ARAG”), and other information. *Id.* at ARAG011331.

7 The 2022 SPD reiterates Microsoft’s authority as Plan Administrator and delegates  
 8 certain of that authority with respect to claims determinations: “The Plan is administered by  
 9 Microsoft according to the terms of the plan documents. Under the terms of the plan, Microsoft  
 10 has the authority to delegate the day-to-day administrative duties to a third party. Microsoft  
 11 shall have complete discretion to interpret and construe the provisions of the plan options,  
 12 programs, and policies described in this SPD, to determine eligibility for participation and for  
 13 benefits, make findings of fact, correct errors and supply omissions. All decisions and  
 14 interpretations Microsoft made pursuant to the plan options, programs and policies described  
 15 in this SPD shall be final, conclusive and binding on all persons and may not be overturned  
 16 unless found by a court to be arbitrary and capricious.... Microsoft may delegate this  
 17 discretionary authority to select service providers, and hereby delegates such authority to each  
 18 service provider to the extent that the service provider is responsible for reviewing and issuing  
 19 claims and appeals determinations under the respective plan options, programs, and policies  
 20 described in this SPD.” *Id.* at ARAG011332.

21 The 2022 SPD contains a “Summary Annual Report for Microsoft Corporation Welfare  
 22 Plan” that: (a) indicates that the Microsoft Welfare Plan “is a welfare benefit plan offering  
 23 health, life, dental, vision, **group legal**, long-term disability, accidental death &  
 24 dismemberment, flexible spending account, paid leave, and an employee assistance plan;” (b)



1 specifies that ARAG Insurance Company is the insurer for the group legal component; and (c)  
 2 affirms that “[t]he annual report has been filed with the Employee Benefits Security  
 3 Administration, as required under the Employee Retirement Income Security Act of 1974  
 4 (ERISA).” *Id.* at ARAG011352-ARAG011353 (emphasis added).

5 **G. Microsoft Included The Microsoft Policy In The Microsoft Welfare Plan’s 2022**  
 6 **Annual Report Under ERISA (Form 5500)**

7 Under 29 U.S.C. §§ 1023(a) and 1024(a), an annual report must be published and filed  
 8 with respect to any ERISA employee benefit plan. The annual report is made on Internal  
 9 Revenue Service Form 5500 (“Form 5500”), which states that “[t]his form is required to be  
 10 filed for employee benefit plans under sections 104 [codified at 29 U.S.C. § 1024] and 4065 of  
 11 the Employee Retirement Income Security Act of 1974 (ERISA) and sections 6057(b) and  
 12 6058(a) of the Internal Revenue Code (the Code).” Mullaly Decl., Ex. 7 at ARAG011933.

13 On the Form 5500 that Microsoft filed for year 2022 with respect to the Microsoft  
 14 Welfare Plan (“2022 Form 5500”), in response to the prompt on Line 8b (“If the plan provides  
 15 welfare benefits, enter the applicable welfare feature codes from the List of Plan Characteristics  
 16 Codes in the instructions”), Microsoft entered: “4A 4B 4D 4E **4G** 4H 4L 4Q.” *Id.* at  
 17 ARAG011934 (emphasis added). In the “List of Plan Characteristics Codes” table in the “2022  
 18 Instructions for Form 5500” published by the IRS, the code “4G” corresponds to “prepaid  
 19 legal.” Mullaly Decl., Ex. 15 at 21 (original pagination).

20 Schedule A to the 2022 Form 5500 is titled “Insurance Information” and states that  
 21 “[t]his schedule is required to be filed under section 104 of the Employee Retirement Income  
 22 Security Act of 1974 (ERISA).” Mullaly Decl., Ex. 7 at ARAG011936. The instructions for  
 23 Schedule A to Form 5500 state that “[t]he insurance company...is required under ERISA  
 24 section 103(a)(2) [codified at 29 U.S.C. § 1023(a)(2)] to provide the plan administrator with



1 the information needed to complete this return/report.” Mullaly Decl., Ex. 15 at 24 (original  
2 pagination).

3 The 2022 Form 5500 reports that the Microsoft Welfare Plan funds its obligations (*see*  
4 Line 9a (Mullaly Decl., Ex. 7 at ARAG011934)) with respect to its “group legal plan” (*see*  
5 Schedule A, Line 8 (*id.* at ARAG011939)) through an insurance policy issued by “ARAG  
6 Insurance Company” bearing contract number “10377-0001-001” in effect from “01/01/2022”  
7 to “12/31/2022” (*see* Schedule A, Line 1 (*id.* at ARAG011936)). This is the Microsoft Policy.  
8 Mullaly Decl., Ex. 1 at ARAG002542.

9 **H. Microsoft Endorsed The Microsoft Policy, Precluding Any Application Of The**  
10 **Voluntary Plan Safe Harbor**

11 The undisputed facts conclusively establish that Microsoft exercised an immense degree  
12 of control over the design and price of the Microsoft Policy, made sustained efforts to promote  
13 the Microsoft Policy among its employees, represented to its employees that the coverage  
14 available under the Microsoft Policy was tailored to their needs, and otherwise endorsed the  
15 Microsoft Policy. As such, the Voluntary Plan Safe Harbor cannot apply.

16 **1. Microsoft Participated In Drafting The Microsoft Policy, Including**  
17 **Selecting The Available Benefits And Establishing The Premium**

18 Microsoft and ARAG collaboratively drafted the portion of the Microsoft SPD that  
19 addresses the Microsoft Policy. For example, on July 27, 2021, a Microsoft representative wrote  
20 to ARAG: “I will also need to update our SPD and it’s due on 8/6. I’ll work on the draft and  
21 will ask ARAG to review as well.” Cosimano Decl., Ex. 5 at ARAG009017. Later in this  
22 process, on August 10, 2021, a Microsoft representative wrote to ARAG: “Will you review our  
23 comments and edits and let me know if you are okay with these?” *Id.*, Ex. 6 at ARAG008872.

24 Microsoft extensively participated in the design of the ARAG coverage for Microsoft  
employees each year, including determination of which benefits would be included. For

1 example, on August 24, 2017, a Microsoft representative wrote to ARAG: “It’s looking like we  
 2 are going to go with the plan design that we most recently discussed, removal of tax and  
 3 financial counseling and replace with the benefits recommended on our last call. No rate  
 4 change.” *Id.*, Ex. 7 at ARAG008931. The same process occurred for 2022 (the year in which  
 5 the Microsoft Policy was issued). For example, on July 13, 2021, a Microsoft representative  
 6 wrote to ARAG: “I am hoping today we can discuss the proposed plan enhancements for 2022.”  
 7 *Id.*, Ex. 5 at ARAG009018. On July 27, 2021, the Microsoft representative wrote to ARAG that  
 8 Microsoft leadership “approved the plan enhancements for CY22.” *Id.* at ARAG009017.

9 Microsoft represented to its employees that Microsoft’s annual review of the ARAG  
 10 policy’s design ensured the quality, breadth, and relevance of its coverage—and thereby offered  
 11 an explicit endorsement of the coverage. For example, Microsoft prepared a communication to  
 12 employees that stated: “Microsoft and ARAG, your legal plan provider, review your legal  
 13 insurance plan benefits each year to ensure they offer a comprehensive mix of services to meet  
 14 your overall legal needs. Based on this year’s review, we determined the newly added benefits  
 15 would provide broader and more relevant coverage to meet our employees’ ongoing legal  
 16 needs.” *Id.*, Ex. 8 at ARAG009438. Microsoft also requested that ARAG contact specific  
 17 attorneys and solicit their applications to join the ARAG network. *Id.*, Ex. 9 at ARAG010611.

18 Microsoft negotiated the price of the Microsoft Policy on behalf of its employees with  
 19 the stated purpose of facilitating employee enrollment in ARAG’s coverage. For example, on  
 20 July 13, 2021, a Microsoft representative wrote to ARAG: “We have been discussing internally  
 21 and while the [ARAG] rate increase [for 2022] is low it does...put the monthly rate over \$20 at  
 22 \$20.57. I am not sure if going over \$20 monthly might cause hesitancy to enroll in the benefit.  
 23 We can discuss further but wanted to share my initial thoughts.” *Id.*, Ex. 5 at ARAG009018.

1 Microsoft also negotiated a five-year rate guarantee with ARAG, for which the Microsoft Policy  
2 was year three. *Id.* at ARAG009016.

3 In 2022 and prior years during which ARAG provided the prepaid legal services that  
4 Microsoft made available as part of its employee benefits package, the two companies worked  
5 closely to tailor ARAG’s benefits, customer service metrics, and promotional communications  
6 to Microsoft’s requirements. *Id.*, ¶ 15, Ex. 18. Microsoft and ARAG had a monthly telephonic  
7 status meeting, as well as an annual stewardship meeting, generally held in-person at  
8 Microsoft’s offices in the second quarter, to discuss ARAG’s performance during the prior  
9 policy year, any major changes in participation, and Microsoft’s plan design preferences for the  
10 renewal policy—including analysis of any industry, economic, or societal developments that  
11 might affect Microsoft employees’ future needs for varying types of legal services. *Id.*, ¶ 16,  
12 Ex. 18. Microsoft’s approval was required for wide-scale communications from ARAG to  
13 Microsoft employees. *Id.*, Ex. 10. Microsoft monitored the accessibility of ARAG’s online  
14 portal (*id.*, Ex. 12) and required ARAG to satisfy premium-at-risk performance guarantees on  
15 matters such as the promptness with which an ARAG customer service representative answers  
16 calls received from enrolled Microsoft employees and the speed and accuracy of claims  
17 payments. *Id.*, Ex. 19.

18 **2. Microsoft Actively And Regularly Promoted The Microsoft Policy To Its**  
19 **Employees, And Even Used Its Own Name (Microsoft) To Describe It**

20 Microsoft’s 2022 SPD characterized the Microsoft Policy to Microsoft employees like  
21 Mr. McNae as “industry leading” and stated that it is one way in which “*Microsoft is here to*  
22 *support* [employees] with benefits and resources to help [them] live life well.” Mullaly Decl.,  
23 Ex. 4 at ARAG010881 (“Microsoft provides industry-leading benefits to help you and your  
24 family get and stay well, prepare for your future, and enjoy life’s journey. Whether you are

1 expecting a new child, *looking for some legal advice for a new home*, or managing a health  
2 condition, *Microsoft is here to support you.*”) (emphasis added).

3 Microsoft organized and directly participated in presentations to Microsoft employees  
4 that extolled the benefits of the ARAG coverage. For example, a Microsoft-branded  
5 presentation (“Talk Benefits To Me”) offered in connection with open enrollment by  
6 Microsoft’s human resources department and two official Microsoft employee resource groups  
7 (“HOLA” and “Families at Microsoft”) touted ARAG’s “Best-in-Class Benefits” and referred  
8 to the ARAG coverage as the “Microsoft Legal Insurance Plan.” *Id.*, Ex. 13 at ARAG009139,  
9 -148.

10 Indeed, a number of Microsoft-approved employee communications used the name  
11 “Microsoft Legal Insurance Plan” to refer to the ARAG coverage. *Id.*, Ex. 10 at ARAG009137.  
12 Other communications by Microsoft to its employees about ARAG bore the Microsoft logo,  
13 stated that “ARAG offers top-performing legal insurance for you and your family,” and referred  
14 to the ARAG coverage as the “Microsoft Group Legal Plan.” *Id.*, Ex. 14 at ARAG009310, -  
15 311.

16 Extensive information and promotional text concerning the ARAG coverage (e.g.,  
17 “Microsoft employees who are members of ARAG Legal Insurance have benefitted by using it  
18 for...”) appeared directly on Microsoft’s self-branded human resources portal without the  
19 presence of ARAG logos and without attribution of the text to any entity other than Microsoft  
20 itself. *Id.*, Ex. 15 at ARAG009893-ARAG009900. Microsoft also arranged for its EAP  
21 (employee assistance program) provider to refer callers to ARAG. *Id.*, Ex. 16 at ARAG010643.

22 An email that Microsoft’s human resources department sent to Microsoft employees in  
23 connection with open enrollment for 2022 benefits promoted the “Group Legal” coverage – i.e.,  
24 the Microsoft Policy – without any reference to ARAG whatsoever. The email, dated October

1 13, 2021, stated “you have plenty of great options to choose from” and featured among the  
 2 “essential updates and enhancements we’ve made for 2022” the following text: “Your life  
 3 outside of work is important. That’s why we’re adding additional benefits to our Group Legal  
 4 insurance plan: Family Law and Real Estate Benefits. Starting January 1, 2022, you can work  
 5 with a network attorney on matters related to alimony, child support, real estate disputes (even  
 6 rental property disputes), and more to help keep everything at home running smoothly. Take  
 7 advantage of everything your Group Legal plan has to offer for only \$20.57 per month....” *Id.*,  
 8 Ex. 17 at ARAG010037, -038.

### 9 **3. Microsoft Required Its Employees To Access ARAG Benefits Through** 10 **Microsoft’s Own Website**

11 Microsoft mandated that employees enrolled in the Microsoft Policy be permitted to  
 12 access ARAG’s online services portal solely by navigating to and signing in via a Microsoft  
 13 website (benefits.me.microsoft.com), rather than directly through ARAG’s own website  
 14 (araglegal.com). Mullaly Decl., Ex. 4 at ARAG011265 (2022 SPD) (“To review your  
 15 Certificate of Insurance, find a network attorney, or get more information about the benefits  
 16 under this plan, call ARAG at (800) 331-3425, email service@ARAGlegal.com, or log onto the  
 17 Microsoft Benefits site and visit the ARAG website.”); Cosimano Decl., Ex. 10 at  
 18 ARAG009135 (“Get started at benefits.me.microsoft.com and select Work & Life > ARAG  
 19 Legal Insurance.”); *id.* (“Your Member ID is also available to download digitally at  
 20 benefits.me.microsoft.com.”); *id.* at ARAG009137 (“Access your ARAG account via  
 21 benefits.me.microsoft.com.”). Attempts by Microsoft employees to log in directly via ARAG’s  
 22 website resulted in an error message directing the user to the Microsoft benefits site (*id.*, Ex. 11  
 23 at ARAG010636), and Microsoft moved to include its logo on the ARAG portal for Microsoft  
 24 employees (*id.*, Ex. 12 at ARAG010635).

1           **4. Microsoft Offered The Microsoft Policy To Its Employees As The Exclusive**  
 2           **Legal Insurance Plan In Its Welfare Plan**

3           In the years that it was offered, ARAG’s coverage was the sole option for prepaid legal  
 4 services that Microsoft offered to its employees as part of a benefits package. Microsoft selected  
 5 ARAG as its provider following a rigorous and competitive Request for Proposal (“RFP”)  
 6 process that Microsoft conducted in 2009. *Id.*, ¶ 17. As part of that process, Microsoft informed  
 7 ARAG that “*Microsoft has determined the voluntary group legal plan is regulated by ERISA*”  
 8 and sought confirmation that “[ARAG] will provide annual Schedule A information for Form  
 9 5500 filings.” *Id.*, Ex. 20 at ARAG010474 (emphasis added).

10           In 2023, Microsoft issued a new RFP for prepaid legal services to be offered as part of  
 11 its employee benefits package. ARAG submitted a proposal, which entailed providing copious  
 12 information to Microsoft for evaluation, presenting to a selection committee, and participating  
 13 in a finalist meeting. As previously, only a single company would be chosen to offer the prepaid  
 14 legal services included in Microsoft’s benefits package. Microsoft selected a competitor of  
 15 ARAG to provide the prepaid legal services benefit going forward and ARAG’s inclusion in  
 16 Microsoft’s employee benefits program ended on December 31, 2023. *Id.*, ¶ 18.

17           **III. SUMMARY JUDGMENT STANDARD**

18           Summary judgment must enter “if the movant shows that there is no genuine dispute as  
 19 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
 20 56(a). Summary judgment is “not a disfavored procedural shortcut,” but is instead the “principal  
 21 tool by which factually insufficient claims or defenses can be isolated and prevented from going  
 22 to trial with the attendant unwarranted consumption of public and private resources.” *Celotex*  
 23 *Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (cleaned up).

#### IV. ARGUMENT

##### A. ERISA Preemption Requires Dismissal Of Plaintiffs’ State Law Claims Arising Under The Microsoft Policy

ERISA, with certain exceptions not here applicable, preempts “any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan” governed by ERISA. 29 U.S.C. § 1144(a) (emphasis added). This express preemption statute is “deliberately expansive,” must be accorded its “broad common-sense meaning,” sweeps in any state law that “has a connection with or reference to” an ERISA plan, and “is not limited to state laws specifically designed to affect employee benefit plans.” *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46-47 (1987). State law claims based on “alleged improper processing of a claim for benefits under an employee benefit plan...undoubtedly meet the criteria for pre-emption,” *id.* at 48, not only because they by necessity “relate to” an ERISA plan but for the additional reason that “Congress clearly expressed an intent that the *civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle* for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits.” *Id.* at 52 (emphasis added).

Here, because undisputed documentary evidence establishes as a matter of law that the Microsoft Welfare Plan is an ERISA plan and that the Microsoft Policy provides prepaid legal services as part of the Microsoft Welfare Plan, ARAG is entitled to summary judgment on all seven state-law causes of action in the Amended Complaint with respect to Plaintiffs’ claims arising under the Microsoft Policy.

##### 1. The Microsoft Welfare Plan Is An ERISA Plan

Under ERISA, an “employee welfare benefit plan” consists of: (1) a “plan, fund or program” (2) “established or maintained” (3) “by an employer or by an employee organization, or by both” (4) “for the purpose of providing” enumerated types of benefits that include



1 “prepaid legal services” (5) to the participants or their beneficiaries. 29 U.S.C. § 1002(1); *Kanne*  
 2 *v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 491–92 (9th Cir. 1988).

3 As detailed above, Microsoft, Mr. McNae’s employer in 2022, established and has  
 4 maintained the Microsoft Welfare Plan with the stated purpose that “[e]ach Participant may  
 5 elect to receive coverage under the benefit coverages described in the Appendices,” Wrap Plan  
 6 Document at § 3, which include the “group legal services benefits” funded through Microsoft’s  
 7 insurance coverage from ARAG as listed in the Wrap Plan Document’s “Appendix II—  
 8 Component Plans.” Mullaly Decl., Ex. 6 at ARAG011388, -408. Accordingly, the Microsoft  
 9 Welfare Plan is an employee welfare benefit plan (and therefore an “employee benefit plan”)  
 10 as defined in 29 U.S.C. § 1002(3). Because 29 U.S.C. § 1003(a) provides that an “employee  
 11 benefit plan...established or maintained...by any employer engaged in commerce or in any  
 12 industry or activity affecting commerce” is governed by ERISA, the Microsoft Welfare Plan is  
 13 governed by ERISA. Mullaly Decl., Ex. 16 (establishing Microsoft engaged in commerce).

14 The Microsoft Welfare Plan also satisfies the formal requirements for establishment of  
 15 an ERISA plan. In accordance with 29 U.S.C. § 1102(a), it is “established and maintained  
 16 pursuant to a written instrument”—the Wrap Plan Document—that identifies the plan fiduciary  
 17 and the plan administrator. Mullaly Decl., Ex. 6 at ARAG011390. Further, in accordance with  
 18 29 U.S.C. § 1102(b), the Wrap Plan Document, including through its incorporation of the  
 19 Component Plans (among them the Microsoft Policy), describes how plan benefits are to be  
 20 funded, defines the responsibilities accorded to the plan administrator (and authorizes  
 21 delegation of the same), identifies how the plan may be amended and by whom, and specifies  
 22 the basis for payments to and from the plan. *Id.* at ARAG011388, -381, -408, -390, -391, -403.



1           **2.       The Microsoft Policy Is Part Of The Microsoft Welfare Plan**

2           The Ninth Circuit holds that courts should consider an employer’s benefit program as a  
3 whole to determine whether an available policy is covered by ERISA. *Peterson v. American*  
4 *Life & Health Ins. Co.*, 48 F.3d 404, 407 (9th Cir.1995) (concluding that “the policy [at issue]  
5 was just one component of [the employer’s] employee benefit program and that the program,  
6 taken as a whole, constitutes an ERISA plan”). Here, Microsoft’s own documents establish as  
7 a matter of law that the Microsoft Policy forms part of the Microsoft Welfare Plan.

8           The Microsoft Policy is expressly identified in Appendix II of the Wrap Plan Document  
9 as a “Component Plan” that confers benefits and that is incorporated by reference into the Wrap  
10 Plan Document. Mullaly Decl., Ex. 6 at ARAG011408, -381, -388. Further, the Wrap Plan  
11 Document expressly affirms that the Microsoft Policy’s “group legal services benefits,” by  
12 virtue of being a benefit “identified in ERISA Sections 3(1) and 4” (i.e., 29 U.S.C. §§ 1002(1),  
13 1003), are “subject to ERISA.” *Id.* at ARAG011406, -408. An entire section of the 2022 SPD  
14 published by Microsoft, a document mandated by ERISA and one of the “written instruments  
15 under which the [Microsoft Welfare Plan] is established and maintained,” is dedicated to the  
16 Microsoft Policy. *Id.*, Ex. 4 at ARAG010882, ARAG011264-ARAG011289; *see* 29 U.S.C. §§  
17 1022, 1024(b).

18           The 2022 SPD also includes the Microsoft Policy in mandatory disclosures under  
19 ERISA, including as the source of funding for the Microsoft Welfare Plan’s “group legal”  
20 services benefit. Mullaly Decl., Ex. 4 at ARAG011331. Finally, Microsoft included the  
21 Microsoft Policy on the Microsoft Welfare Plan’s 2022 Form 5500—a form whose completion  
22 is required by ERISA and with respect to which ERISA mandates that ARAG—as the source  
23 of funding for the Microsoft Welfare Plan’s “prepaid legal” benefit—furnish Microsoft the  
24 information necessary for Microsoft’s “Schedule A” disclosures. *Id.*, Ex. 7 at ARAG011933-

1 ARAG011939; *see* 29 U.S.C. §§ 1023(a) and 1024(a). These documents conclusively  
 2 demonstrate that the Microsoft Policy is, as a matter of law, part of the Microsoft Welfare Plan  
 3 and governed by ERISA.

4 **3. Plaintiffs’ State Law Claims Arising Under The Microsoft Policy Are**  
 5 **Preempted Because They “Relate To” An ERISA Plan And Conflict With**  
 6 **ERISA’s Exclusive Civil Remedy**

7 In recognition that regulatory requirements vary by state, such that a benefits  
 8 administrator might otherwise be required “to process claims in a certain way in some States  
 9 but not in others,” ERISA seeks to enable “a uniform administrative scheme” and “a set of  
 10 standard procedures to guide processing of claims and disbursement of benefits.” *Fort Halifax*  
 11 *Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). This aim reflects the judgment of Congress that  
 12 “[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit  
 13 program operation, which might lead those employers with existing plans to reduce benefits,  
 14 and those without such plans to refrain from adopting them.” *Id.* at 11.

15 To effectuate ERISA’s purpose of enabling a uniform regulatory regime for employee  
 16 benefit plans, “section 514(a) of ERISA provides that ERISA supersedes all State laws insofar  
 17 as they may ‘relate to’ an ERISA plan.” *Nielsen v. Unum Life Ins. Co. of Am.*, 58 F. Supp. 3d  
 18 1152, 1162 (W.D. Wash. 2014) (quoting 29 U.S.C. § 1144(a)). The words “relates to” must be  
 19 construed here “in their broadest sense” and has explained that a law “relates to” an employee  
 20 welfare benefit plan “if it has a connection with or reference to such a plan.” *Shaw v. Delta Air*  
 21 *Lines, Inc.*, 463 U.S. 85, 96-97 (1983). “[E]ven if the law is not specifically designed to affect  
 22 such plans, or the effect is only indirect,” a state law still may “relate to” an ERISA plan and  
 23 thereby be preempted. *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990). “**ERISA**  
 24 ***preemption is conspicuous for its breadth, and ERISA contains one of the broadest***

1 *preemption clauses ever enacted by Congress.” Peterson v. Am. Life & Health Ins. Co.*, 48  
 2 F.3d 404, 409 (9th Cir. 1995) (internal quotes and citations omitted) (emphasis added).

3 This Court specifically recognizes that the relationship between an ERISA plan  
 4 participant or beneficiary (e.g., Plaintiffs) and an insurer delegated authority to make benefits  
 5 determinations under such a plan (e.g., ARAG) “is patently governed by ERISA,” triggering  
 6 preemption. *Nielsen*, 58 F. Supp. 3d at 1165; *see* Mullaly Decl., Ex. 4 at ARAG011332  
 7 (delegation to ARAG). The Ninth Circuit holds that, notwithstanding the savings clause for  
 8 state laws that regulate insurance, *see* 29 U.S.C. § 1144(b)(2)(A), ERISA expressly preempts  
 9 claims for insurance bad faith, including under the Washington Insurance Code (“WIC”) and  
 10 the Washington Consumer Protection Act (“CPA”). *Id.* (citing *Bast v. Prudential Ins. Co.*, 150  
 11 F.3d 1003, 1007-08 (9th Cir.1998)). This Court has reached the same conclusion with respect  
 12 to the Washington Insurance Fair Conduct Act (“IFCA”). *Nielsen*, 58 F. Supp. 3d at 1165. That  
 13 result follows inexorably from the Ninth Circuit’s reasoning in *Bast*, which assesses “whether  
 14 the parties’ relationships are ERISA-governed” and applies with equal force to the IFCA as to  
 15 the WIC and CPA. *Bast*, 150 F.3d at 1008.

16 Moreover, a cause of action based on state law is conflict preempted “if it conflicts  
 17 directly with an ERISA cause of action.” *Nielsen*, 58 F. Supp. 3d at 1162. The conflict presented  
 18 here is with ERISA Section 502(a), codified at 29 U.S.C. § 1132(a), in which “Congress set  
 19 forth an integrated and comprehensive civil enforcement scheme, which provides the *exclusive*  
 20 *remedy* for rights guaranteed under ERISA” and “possesses *extraordinary preemptive* power.”  
 21 *Id.* (internal quotations omitted) (emphasis added). Indeed, the Supreme Court holds that “*any*  
 22 state-law cause of action that duplicates, supplements, or supplants the ERISA civil  
 23 enforcement remedy conflicts with the *clear congressional intent to make the ERISA remedy*  
 24 *exclusive* and is therefore pre-empted.” *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004)

1 (emphasis added); *see also Nielsen*, 58 F. Supp. 3d at 1162-1165 (holding common law and  
2 statutory claims alike preempted under ERISA and dismissing same). ERISA’s exclusive  
3 remedy provision means that ERISA governs *what* relief may be available and requires that  
4 relief to be sought *exclusively* through a claim under ERISA § 502(a), codified at 29 U.S.C. §  
5 1132(a). *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (“The  
6 six carefully integrated civil enforcement provisions found in § 502(a)...provide strong  
7 evidence that Congress did *not* intend to authorize other remedies that it simply forgot to  
8 incorporate expressly.”).

9 The Supreme Court has applied this analysis directly and with particular force to state  
10 law causes of action that, like the Washington statutory and common law claims asserted by  
11 Plaintiffs here, target claims handling activity. In *Pilot Life*, the Supreme Court expressed full  
12 agreement with the Solicitor General’s argument that “Congress clearly expressed an intent that  
13 the civil enforcement provisions of ERISA § 502(a) [29 U.S.C. § 1132(a)] be the exclusive  
14 vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing  
15 of a claim for benefits, and that varying state causes of action for claims within the scope of §  
16 502(a) would pose an obstacle to the purposes and objectives of Congress.” *Pilot Life*, 481 U.S.  
17 at 52.

18 For the above reasons, Plaintiffs cannot maintain any state law claims arising from the  
19 Microsoft Policy. Their existing claims of this kind in Count 1 (declaratory judgment premised  
20 on state law), Count 2 (breach of contract), Count 3 (bad faith), Count 4 (negligent claims  
21 handling), Count 5 (CPA), Count 5 [sic.] (injunctive and equitable relief premised on state law),  
22 and Count 6 (IFCA) of the Amended Complaint, *see* ECF 14 at ¶¶ 58-102, must be dismissed.

**B. The Voluntary Plan Safe Harbor Does Not Apply To The Microsoft Policy**

Plaintiffs may seek to evade ERISA preemption by arguing that the Microsoft Policy is exempt from ERISA under the Voluntary Plan Safe Harbor. An employer like Microsoft “can establish an ERISA plan rather easily”—even if it “does no more than arrange for a ‘group-type insurance program’”—“unless it is a mere advertiser who makes no contributions on behalf of employees.” *Credit Managers Ass’n of S. California v. Kennesaw Life & Acc. Ins. Co.*, 809 F.2d 617, 625 (9th Cir. 1987). The burden to establish the safe harbor is upon the Plaintiffs. *Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 942 (9th Cir. 2008) (“For [plaintiff] to prevail on this point, he would have to prove that the plan meets four separate requirements of the regulation [29 C.F.R. § 2510.3–1(j)]”). Any such argument fails as a matter of law, and, even if it did not, Plaintiffs cannot establish any genuine factual dispute with respect to at least two of the requirements.

**1. The Voluntary Plan Safe Harbor Does Not Apply Because Microsoft Endorsed The Microsoft Policy**

The Plaintiffs must show, among other things, that “[t]he *sole functions of [Microsoft]* with respect to the [Microsoft Policy] are, *without endorsing the [Microsoft Policy]*, to permit [ARAG] to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to [ARAG].” 29 C.F.R. § 2510.3-1(j)(3) (emphasis added).

**a. Microsoft Endorsed The Microsoft Policy As A Matter Of Law By Identifying Itself As Plan Administrator**

As an initial matter, any such showing is impossible as a matter of Ninth Circuit law. Both the Wrap Plan Document and the 2022 SPD name the employer, Microsoft, as the Plan Administrator of the Microsoft Welfare Plan, into which the Microsoft Policy is expressly incorporated as a “Component Plan.” Mullaly Decl., Ex. 6 at ARAG011408, Ex. 4 at

1 ARAG011332. In the Ninth Circuit, the plan administrator of a plan “‘endorses’ it within the  
 2 meaning of 29 C.F.R. § 2510.3–1(j)(3)” as a matter of law, precluding any application of the  
 3 Voluntary Plan Safe Harbor. *Kanne*, 867 F.2d at 493; *see also Zavora v. Paul Revere Life Ins.*  
 4 *Co.*, 145 F.3d 1118, 1121 (9th Cir. 1998) (“*Kanne* suggests that a plan administrator necessarily  
 5 endorses a plan.”); *Galloway v. Lincoln Nat. Life Ins. Co.*, No. 09-cv-1479, 2010 WL 2679894,  
 6 at \*5 (W.D. Wash. July 2, 2010) (“because the SPD names [employer] as administrator of the  
 7 Plan and because the Plan includes the Voluntary Policy, [employer] endorsed the Voluntary  
 8 Policy within the meaning of the safe harbor’s third provision”). Microsoft’s role as plan  
 9 administrator is dispositive, and the Voluntary Plan Safe Harbor does not apply as a matter of  
 10 law.

11 **b. Microsoft Endorsed The Microsoft Policy As A Matter Of Law**  
 12 **Through Numerous Other Actions**

13 To determine whether an employer endorsed a particular insurance plan, the Ninth  
 14 Circuit considers “all the surrounding circumstances from the point of view of a reasonable  
 15 person.” *Kennesaw*, 809 F.2d at 625. Each of the relevant factors confirms that Microsoft  
 16 endorsed the Microsoft Policy.

17 First, an employer endorses a policy when it participates in designing the policy. See  
 18 *Yoon v. First Unum Life Ins.*, 2009 WL 2581281, at \*5 (N.D. Cal. Aug 20, 2009) (plan is  
 19 endorsed by employer where plan was “designed to satisfy...specific requirements” of the  
 20 employer or where the employer played an “active, central role in creating and designing” it).  
 21 Here, Microsoft took an active role in designing the Microsoft Policy, instructing ARAG  
 22 regarding the benefits to be offered, and negotiating the price of ARAG coverage for its  
 23 employees. Section II(H), *supra*; *see, e.g.*, Cosimano Decl., Ex. 5.

1 Second, an employer endorses a policy when it promotes the policy. *Steen v. John*  
2 *Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 917 (9th Cir.1997); *Wilson v. Provident Life and*  
3 *Acc. Ins. Co.*, 101 F.Supp.3d 1038, 1044 (W.D. Wash. 2015) (employer endorsed insurance  
4 plan by distributing a brochure with the employer’s logo advertising the plan and characterizing  
5 it as a company plan). Here, Microsoft conferred its imprimatur upon and actively promoted  
6 the Microsoft Policy by representing to employees that it annually scrutinized and tailored the  
7 policy’s benefits to ensure their adequacy (Cosimano Decl., Ex. 8 at ARAG009438),  
8 participating in benefits presentations touting ARAG’s “Best-in-Class Benefits” and labelling  
9 the policy the “Microsoft Legal Insurance Plan” (*id.*, Ex. 13 at ARAG009139, -148), marketing  
10 the policy to employees by communicating that “ARAG offers top-performing legal insurance  
11 for you and your family” (*id.*, Ex. 14 at ARAG009310), providing extensive information  
12 regarding the benefits of signing up for the policy (*id.*, Ex. 15 at ARAG009893-ARAG009900),  
13 and requiring employees to access ARAG’s online services solely through Microsoft’s own  
14 website (*id.*, Ex. 11 at ARAG010636).

15 Third, an employer endorses a policy where it represented to employees that it had the  
16 power to amend, modify, terminate, or discretionarily interpret the policy. *LaPrease v. Unum*  
17 *Life Ins. Co. of Am.*, 347 F.Supp.2d 944, 950 (W.D.Wash.2004) (no safe harbor where employer  
18 retained such authority). Here, Microsoft represented to employees in its plan documents that  
19 it retained not only authority to amend or terminate the Microsoft Policy as a Component Policy  
20 of the Microsoft Welfare Plan (Mullaly Decl., Ex. 6 at ARAG011403), but also “complete  
21 discretion to interpret and construe the provisions of the plan options, programs, and policies  
22 described in [the 2020] SPD, to determine eligibility for participation and for benefits, make  
23 findings of fact, correct errors and supply omissions” (*id.*, Ex. 4 at ARAG011332).



Fourth, an employer endorses a policy when it files ERISA-mandated forms with the government. *Pacificare Inc. v. Martin*, 34 F.3d 834, 837 (9th Cir. 1994). Here, Microsoft included the Microsoft Policy on ERISA-mandated forms and publications, including the 2022 SPD and the 2022 Form 5500. *Id.*, Ex. 4 at ARAG011331, Ex. 7 at ARAG011933-ARAG011939.

Fifth, an employer endorses a policy where it provides only a single option with respect to that benefit. *Steigleman v. Symetra Life Ins. Co.*, 701 F. Supp. 3d 924, 931 (D. Ariz. 2023) (finding endorsement where employees could not choose benefits other than those provided by a specific plan). Here, the Microsoft Policy was the sole prepaid legal services benefit that Microsoft made available to its employees. Mullaly Decl., Ex. 4 (2022 SPD); Cosimano Decl., ¶ 17.

These undisputed, documented facts compel the conclusion that Microsoft endorsed the Microsoft Policy within the meaning of 29 C.F.R. § 2510.3-1(j)(3) as a matter of law, thereby eliminating any possibility of the Voluntary Plan Safe Harbor exempting the Microsoft Policy from ERISA.

## **2. The Voluntary Plan Safe Harbor Does Not Apply Because Microsoft Contributed Premiums To The Welfare Plan**

Plaintiffs also would have to establish that “[n]o contributions are made by an employer.” 29 C.F.R. § 2510.3-1(j)(1). Even if Microsoft did not specifically contribute to premiums for the Microsoft Policy on behalf of employees, Microsoft did contribute to premiums for other parts of the Microsoft Welfare Plan. Mullaly Decl., Ex. 4 at ARAG010906. In the Ninth Circuit, “[s]o long as [employer] pays for *some* benefits, ERISA applies to the whole plan, even if employees pay entirely for other benefits.” *Sgro*, 532 F.3d at 943. As such, Plaintiffs cannot raise any genuine issue of material fact that the safe harbor applies.



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**V. CONCLUSION**

For the above reasons, ARAG respectfully requests partial summary judgment dismissing, on the basis of ERISA preemption, all seven counts of Plaintiffs' first amended complaint [ECF No. 14] insofar as they arise from the Microsoft Policy.

DATED: March 6, 2025.

I certify that this memorandum contains 8,349 words, in compliance with LR 7(e)(3).

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**CERTIFICATE OF CONFERRAL**

Counsel for ARAG sought to meet and confer with Plaintiffs regarding this motion for partial summary judgment on several occasions. On February 20, 2025, counsel emailed the Plaintiffs stating that it intended to file this motion and asking for Plaintiffs' availability to meet and confer on Friday or the next Monday. *See* Mullaly Decl., Ex. 17. Ms. McNae responded the next day that, "Due to a current illness requiring strong medication, I am unable to participate in a conference call in the next few days. Additionally, I am awaiting the judge's ruling." *Id.* Later on Friday, February 21, counsel for ARAG requested Plaintiffs' availability to meet and confer the next Tuesday. *Id.* Ms. McNae responded on Monday, February 24 that she would be unable to participate in a meet and confer call that week, and instead requested that ARAG provide her with its working draft of the motion so that she could review it and provide her position via email. *Id.* On Monday, March 3, counsel for ARAG declined to provide Plaintiffs with ARAG's work product, but sent an email explaining the basis for this motion, as well as pointing to ARAG's prior court filings and discovery responses that also contained the basic factual and legal framework for ARAG's position. *Id.* Counsel for ARAG did not receive a response to that email. Mullaly Decl., ¶ 20. Three business days have elapsed since ARAG's final attempt to make contact and meet and confer with the Plaintiffs regarding this matter, and counsel for ARAG therefore certifies that it has met its obligation to make a meaningful attempt to meet and confer with Plaintiffs prior to filing this motion.

**CERTIFICATE OF SERVICE**

Pursuant to the laws of the United States, the undersigned certifies under penalty of perjury that on the 6<sup>th</sup> day of March, 2025, the document attached hereto was served upon the below in the manner indicated:

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- ☐ Via CM/ECF
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DATED this 6<sup>th</sup> day of March, 2025, in Columbus, OH.

By s/Michael T. Mullaly  
Michael T. Mullaly